

## **SPECIES ELECTION**

### **I. Election Requirement**

#### **A. First Election Requirement**

The Examiner requires election among the following species as follows:

1. Species A – Figures 1-5, 13, 19b, 21-24, and 28a-29b
2. Species B – Figure 9
3. Species C – Figure 16
4. Species D – Figure 17
5. Species E – Figures 18, 19a, 20, 25, and 27

Applicant hereby elects, with traverse, the embodiments depicted in the Figures identified as Species A, which includes Figures 1-5, 13, 19b, 21-24, and 28a-29b.

The Examiner has indicated that claims 1, 62, and 71 are generic. Applicant assumes that Examiner meant claims 2, 62, and 71 are generic, because claim 1 is currently cancelled and claim 2 is the next independent claim.

Applicant identifies the following claims as readable on species A: 2-4, 6-10, 37-38, 41, 43-46, 49, 51-56, and 62-73.

#### **B. Second Election Requirement**

The Examiner requires that Applicant further elect one of the following species as follows:

1. Species AA – Figures 6 and 10-12
2. Species AB – Figure 7
3. Species AC – Figure 8
4. Species AD – Figure 14
5. Species AE – Figures 15

Applicant contends that this election requirement is defective in that the subspecies AA, AB, AC, AD, and AE bear no relation whatsoever to the figures identified above for species A. As identified by the Examiner, Species A comprises figures 1-5, 13, 19b, 21-24, and 28a-29b. Therefore, any subspecies of A must be a subset of these figures. The figures identified for subspecies AA, AB, AC, AD, and AE, however, do not coincide with any of the figures designated for species A and consequently, none of the subspecies figures 6-8, 10-12, 14, and 15, by definition, form a subspecies of species A.

Applicant discussed this defect with the Examiner on Monday, April 30, 2007. The Examiner recognized that this subspecies election was defective. Accordingly, Applicant elects species A as indicated above in Section A and is unable to elect a subspecies of A as recognized by the Examiner. Thus, Applicant respectfully requests that the Examiner continue with the examination of elected species A, which are readable on claims 2-4, 6-10, 37-38, 41, 43-46, 49, 51-56, and 62-73.

## **II. Traversal of Species Election Requirement**

Although Applicant is making the above election to be fully responsive to the restriction requirement, Applicant respectfully traverses the election requirement and reserves the right to petition under 37 C.F.R. §1.144. Applicant requests reconsideration and withdrawal of the restriction requirement with respect to species identified in the Office Action for at least the following reasons.

First, the Office Action merely alleges that the species are “independent or distinct.” Office Action at 2 (emphasis added). The correct standard for restriction is whether the species are “independent and distinct,” and not whether they are “independent or distinct.” 35 U.S.C. § 121 states that “[i]f two or more independent and distinct inventions are claimed in one application, the Director may require the application to be restricted to one of the inventions.” 37 C.F.R. §1.142(a) also states the “separate and distinct” standard: “[i]f two or more independent and distinct inventions are claimed in a single application, the examiner in an Office Action will require the applicant in the reply to that action to elect an invention to which the claims will be restricted, this official action being called a requirement for restriction (also known as a requirement for division).” There is no statutory or regulatory authority for the Examiner to restrict where the species may be “separate or distinct.” Thus, the statutory burden for requiring an election of species has not been alleged or met in this Office Action.

Second, the figures identified by the Examiner in the separate species and subspecies classifications overlap in scope and thus are not mutually exclusive.

Third, the Examiner has not met the appropriate standard for establishing a serious burden on the Examiner if the election requirement is not made. The Office action is devoid of any such showing of serious burden. Without this showing, the election requirement is improper. In particular, M.P.E.P. § 808.02 provides as follows:

[T]he examiner, in order to establish reasons for insisting upon restriction, must explain why there would be a serious burden on the examiner if restriction is not required. Thus the examiner must show by appropriate explanation one of the following:

(A) Separate classification thereof: This shows that each invention has attained recognition in the art as a separate subject for inventive effort, and also a separate field of search. Patents need not be cited to show separate classification.

(B) A separate status in the art when they are classifiable together: Even though they are classified together, each invention can be shown to have formed a separate subject for inventive effort when the examiner can show a recognition of separate inventive effort by inventors. Separate status in the art may be shown by citing patents which are evidence of such separate status, and also of a separate field of search.

(C) A different field of search: Where it is necessary to search for one of the inventions in a manner that is not likely to result in finding art pertinent to the other invention(s) (e.g., searching different classes/subclasses or electronic resources, or employing different search queries, a different field of search is shown, even though the two are classified together. The indicated different field of search must in fact be pertinent to the type of subject matter covered by the claims. Patents need not be cited to show different fields of search.

Where, however, the classification is the same and the field of search is the same and there is no clear indication of separate future classification and field of search, no reasons exist for dividing among independent or related inventions.

M.P.E.P. § 808.02. The Office Action fails to allege any of the above three criteria with the clear reasons and explanations required for establishing a serious burden on the Examiner.

Furthermore, the Office action's assertion that "the species as claimed are not capable of use together and are mutually different in design" is inadequate to support restriction. M.P.E.P. § 808.01 requires that "[t]he particular reasons relied on by the examiner for holding that the inventions as claimed are either independent or distinct should be concisely stated. A mere statement of conclusion is inadequate. The reasons upon which the conclusion is based should be given." The rationale advanced in the Office action is nothing more than a mere statement of conclusion. Applicant is aware of no legal support for the proposition that "the species as claimed are not

capable of use together and are mutually different in design” are necessarily independent or distinct inventions. Without further explanation, the election requirement is improper.

Although Applicant is making the above election to be fully responsive to the restriction requirement, Applicant respectfully traverses the requirement and reserves the right to petition under 37 C.F.R. §1.144. Applicant requests reconsideration and withdrawal of the election requirement.

### CONCLUSION

Authorization is hereby given to charge Deposit Account No. 10-0096 for any deficiency of fees.

The Applicant invites the Examiner to contact the undersigned for a teleconference to resolve any outstanding issues, as this Response is believed to put the case in condition for allowance.

Respectfully submitted,  
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### CERTIFICATE OF MAILING

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being deposited on the date shown below with the United States Postal Service, with sufficient postage as First Class Mail (37 CFR 1.8(a)), in an envelope addressed to Mail Stop AMENDMENT, Commissioner for Patents, P.O. Box 1450, Alexandria, VA, 22313-1450.

Date: May 15, 2007

  
Renee Treider